IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 926 OF 1988

Nandkumar Munnaswami Pilley]
age about 40 years, Occ: Service]
R/o. 350/2 Depot Line Khadaki]
Bazar, Pune, (At present in]..Appellant
Yerwada Central Prison, Pune)] (Accused)

versus

The State of Maharashtra]..Respondent

AND
CRIMINAL APPEAL NO. 761 OF 1987

Hamajekhan Kasam Mulani]
age 34, residing at Karad,]
District Satara (presently in]..Appellant
Yerwada Jail)] (Accused)

v/s.
State of Maharashtra]..Respondent

None for the Appellant - Accused in both the matters.

Mr. V. B. Konde-Deshmukh, APP for the Respondents - State.

CORAM : D. G. DESHPANDE, &
S. R. SATHE, JJ.
DATE : 29TH MARCH, 2007.

ORAL JUDGMENT : (Per. D. G. DESHPANDE, J.) :

1. Appeal No. 926 of 1988 is filed by the appellant - accused challenging his conviction under Section 302 of Indian Penal Code, in 1988 and

admitted on 4.11.1988 by this court. On the same day bail was granted to the accused. At that time accused was represented by Advocate Mr. S.S. Deshnmukh, then on 28.9.2004 the Division Bench noted that Advocate Mr. S.S. Deshmukh for the accused is dead and therefore an order was passed for issuing notice to the accused as to whether he wants to engage any Advocate. This order was passed on 28.9.2004 and notice was made returnable after four weeks. Then there is noting in the Roznama dated 3.1.2005 that notice of the accused has returned back "unserved" with report of the Commissioner of Police, Pune, stating that accused Nandkumar M. Pilley is not residing at the given address and his whereabouts are not known even to his brother, who is residing on the said address.

2. Thereafter on 10.2.2005 the Division Bench passed an order of issuing non bailable warrant against the accused, returnable on 7.2.2005. No report was received by this court whether non bailable warrant was executed or not and therefore explanation was called from the Sessions Court by 24.2.2005. Thereafter, the report was received from the Additional Sessions Judge, Pune, stating that

non bailable warrant returned unexecuted as the accused was not residing on the given address. Again fresh non bailable warrant was issued but it was returned unserved i.e. the last report, noting dated 26.4.2005. Then by order dated 20.3.2006 again notice was ordered to be issued to the accused to remain present or engage Advocate to represent him in the Appeal. But notice was not served, again non bailable warrant was issued. Similarly notice also could not be served. Then Division Bench by order dated 23.11.2006 directed issue of proclamation under Section 82 of Criminal Procedure Code. Then report about proclamation was received along with the panchnama etc. as required by Criminal Procedure Code.

3. So far as Criminal Appeal No. 761 of 1987 is concerned, the same was filed by the accused challenging his conviction under Section 302 of Indian Penal Code. He was represented by Mr. P. S. Patankar. On account of his elevation to this court, notices and reminders were sent to the accused, non bailable warrant was issued to the accused on 31.8.2006. Ultimately on 15.11.2006, following order was passed :

"1. In this case the appellant - accused was represented earlier by Advocate P.S. Patankar, who was thereafter elevated as High Court Judge. Then notices were issued to the appellant - accused. He did not remain present. Non bailable warrants have been issued since long i.e. 31.8.2006. There is no response or report about the same. The appeal is pending since 1987. It cannot be said that the appellant - accused is not aware of his pending case. He is on bail and it is clear that he is enjoying the bail and remaining absent continuously before this court.

2. In the circumstances, the learned APP makes an oral application for permission to take appropriate action against the appellant - accused. Permission granted. Therefore, first they will issue proclamation under Section 82 of the Criminal Procedure Code and if the proclamation is of no effect, then action under Section 83 of the Criminal Procedure Code shall be followed.

3. Put up the matter on 10.1.2007."

Again on 7.2.2007, the following order was passed:

"1. Appellant - accused is not amenable to the non-bailable warrant. By an earlier order dated 15.11.2006, action under Sections 82 and 83 of the Criminal Procedure Code was ordered to be taken against him.

2. When the accused even after conviction, files Appeal and his sentence is suspended and he is granted bail but he absconds and does not makes him available when the matter is called out, the question is whether the

accused still retains the right of hearing the Appeal, and, why the Appeal should not be dismissed and the accused be arrested and sent to jail for undergoing the imprisonment. Learned APP to come prepared on this aspect. Matter is adjourned to 21.2.2007 till then the trial court to take action against the sureties immediately, without fail."

Report was received that accused do not reside at the address given. It is report dated 5.3.2007 filed by the learned APP Mr. V. B. Konde-Deshmukh.

4. Again both the matters appeared before us and we posed before ourselves a question as to whether the accused person after having secured bail from the High Court, continuously remains absent, does not respond to court notices, does not respond to bailable or non bailable warrants and does not respond to proclamations under Cr.P.C., has a right to contend that his appeal should not be dismissed in default but it should be heard and decided on merits.

5. There are hundreds of matters like this pending before this court wherein the appeals have been filed by the accused challenging their

conviction under section 302 of the IPC or other major offences where appeals have been admitted, bail granted to the accused and then for years together, accused did not remain present and they misused the bail, they jumped of the bail and they do not care to make any arrangement by engaging Advocate and their Advocates also die, accused are becoming untraceable even after all the efforts are being made in that regard. Therefore, the question before us is whether such appeals should be dismissed by the court because the accused are absent.

6. We are aware of the provisions of the Cr.P.C. and Judgments of the Supreme Court in this regard. Those provisions are contained in Sections 384, 385 and 386 of the Cr.P.C. Section 384 of Cr.P.C. empowers the court to dismiss the appeal summarily, if upon examining the petition of appeal and copy of the judgment, the appellate court considers that there is no sufficient ground for interfering the appeal, the appeal can be dismissed summarily. However, before doing that, opportunity has to be given to the advocate of the accused of hearing or whoever is appellant, and if the appeal

is to be dismissed by the Sessions Court under this provision or the Chief Judicial Magistrate it has to record its reasons for doing so.

7. If the appeal is not so summarily dismissed under Section 384, then the appellate court shall under Section 385 give notice of the time and place at which the appeal shall be heard. Such notice shall be given to the appellant or to his pleader, to the State Government, if necessary under sub section (1)(iv), if the appeal is under Section 377 or 378, to the accused.

8. Section 386 empowers the appellate court to decide the appeal on merits. In this regard we are following the judgment of the Supreme Court reported in **1996 Cri.L.J 3491 Bani Singh & ors. vs. State of U.P.** because our experience was that in scores of matters i.e. appeals coming for final hearing, advocates for the accused do not appear. Therefore, we were following the aforesaid judgment and deciding the appeals on merits, because Section 386 first part requires **"after perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appear...."**, it will

be clear that it is obligatory upon the accused or the public prosecutor to appear before the court when the matter is fixed for hearing, and it is in this background that the Supreme Court in the above said matter has held that if inspite of notice nobody appears for the accused then the court can decide the appeal after hearing the party present and going through the entire record.

9. But however the cases before us are totally different. In one of the matter Advocate for the accused has expired and in other matter Advocate for the accused was elevated as Judge to the High Court. Accused are enjoying liberty of bail from 1988 onwards when bail was granted to them by this court. They are not amenable and available to notices, non bailable warrants and action under Sections 82 and 83 of the Cr.P.C. and therefore the question is whether the court should wait for other 20 years or wait indefinitely for the accused to appear before us and engage an advocate and then argue the appeals.

10. One course is open to us that is to appoint an Advocate from the Legal Aid Panel, the first

requirement in that regard is if the accused initially appointed an Advocate of his choice, then he has to be given an opportunity to appoint Advocate of his choice, but we cannot have recourse to this remedy because the accused are not responding to the notices, warrants or action under Section 82 of the Cr.P.C. they have simply vanished.

11. Even otherwise i.e. even if we appoint Advocate from the Legal Aid Penal to represent the accused in these cases, the question will be if we dismiss the appeal, then how to secure the presence of the accused so that they can be taken into custody and sent to jail for undergoing the sentence. If the accused are absconding now and not available since 1988 or atleast since the time notices were issued to them from 2004, what is the guarantee that after their appeals are dismissed, they will make themselves available. We have no doubt, in our mind, that even if we appoint an Advocate to represent the accused and we dismiss the appeal in case there is no merit, the accused will not make themselves available for undergoing the sentence. By their conduct i.e. leaving the place

of their residence and not giving any hint as to where they are going, in one of the present matter to his brother and not making available for execution of non bailable warrants or not responding to action under Section 82 of the Cr.P.C. we have no doubt, in our mind, that accused will never be available for undergoing the sentence. Again and again same efforts of getting them arrested will have to be undertaken by the trial court.

12. Supposingly, in case we allow the appeal and acquit the accused then not only the accused in the present cases will be benefited by getting an order of acquittal but it will send a wrong signal to all the litigants throughout the State; they will realise that even if they jump of the bail, even if they do not engage any advocate and even if they do not care to remain present in the court they can get acquittal meaning thereby that their illegal acts of jumping the bail, committing breach of the bond executed at the time of bail, do not matter in the least and get a stamp of approval from the High Court.

13. We are of the considered opinion that in

such an eventuality the number of cases where the accused go absconding or accused jump of bail, will increase enormously adding to the pendency of the cases before this court for more than two decades.

14. We may point out one of the provisions of the Cr.P.C. in this regard. Section 438 of the Cr.P.C. provides for anticipatory bail or granting bail to persons apprehending arrest. This Section has been amended in the State of Maharashtra and sub section (4) provides that the presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the court, if on an application made to it by the Public Prosecutor, the court considers such presence necessary in the interest of justice. This provision came to be incorporated because it was the experience of the courts that without appearing before the court, applications for anticipatory bail were moved, interim orders obtained and till the final hearing the accused never appeared before the court. The provisions of anticipatory bail was misused by many person not residing in the country because presence of the applicant was not at all

necessary. Therefore, if presence of the applicant seeking anticipatory bail is made compulsory by inserting sub section (4) to Section 438 of the Maharashtra Amendment may be on the application of the Public Prosecutor then, in our opinion, when the criminal appeals are finally decided the accused must be present before the court or through his lawyer or it must be shown that he is available and amenable to the process of the court whatever be the order passed in the appeal. When bail is granted by this court to accused upon admission of appeal the accused binds himself to remain present as and when called and to undergo the sentence if his conviction is upheld by this court.

15. The accused in the present cases have flouted the bond, have jumped the bail, they are not making themselves available, non bailable warrants have been of no use, action under Section 82 of the Cr.P.C. has been of no use, and, in our considered opinion, such an accused cannot still contend nor can be permitted to contend that his appeal has to be heard on merits and it cannot be dismissed. Therefore, dismissal of the appeal is the only alternative left before us. For all the reasons

stated, we pass the following order:

ORDER

. Both the appeals are dismissed. The concerned Sessions Court to take steps to arrest the accused and sent them to jail for undergoing the sentence imposed upon them.

(D.G. DESHPANDE, J.)

(S. R. SATHE, J.)